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In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, PETITIONER

v.

ONA MAE REED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES AS RESPONDENT SUPPORTING PETITIONER

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The Aid to Families with Dependent Children (AFDC) part of the Social Security Act (Title IV, Part A of the Act, 42 U.S.C. (& Supp. II) 601 *et seq.*), establishes a cooperative federal-state assistance program for "needy" dependent children and the persons who care for them. *Shea* v. *Vialpando*, 416 U.S. 251, 261 (1974). To ensure that only the most impoverished families receive this assistance, however, the Act requires that participating states, "except as may be otherwise provided in [the statute], * * * take into consideration *any* other income and resources" of a family unit in determining its eligibility for AFDC benefits (42 U.S.C. (Supp. II) 602(a)(7)(A) (emphasis added)), and prorate over a future period the "amount of earned or unearned income which, together with all other income for that month not [expressly required to be disregarded by the

statute], exceeds the State's standard of need * * *" (42 U.S.C. (Supp. II) 602(a)(17)). The Act charges the Secretary of Health and Human Services (Secretary) with the responsibility for interpreting and enforcing these requirements (see 42 U.S.C. (Supp. II) 602(a), 1302) and, in that role, the Secretary has determined that participating states can and should treat personal injury and workers' compensation awards as "income" for benefit eligibility computation purposes. See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)); J.A. 58-59, 62-63, 66-67. This Court's precedents require that the Secretary's determination be sustained unless it is unreasonable, even if some observers might find another interpretation of the statute "more natural." *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 6; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Respondents have not come close to showing that the Secretary's determination is unreasonable.

1. Respondents first claim (Br. 12-19) that, because personal injury and workers' compensation awards produce no "gain or profit," the Secretary's treatment of such awards cannot be reconciled with the "plain and ordinary" meaning of the term "income." This contention is unfounded.

The term "income" simply has no "plain and ordinary" meaning—at least not in the singular sense of "gain or profit" (as respondents suggest). See Resp. Br. 13-15. "Income" is a term "having different meanings, dependent upon the connection in which it is used and the result intended to be accomplished." *Ballentine's Law Dictionary* 601 (3d ed. 1969); accord, *Merrick* v. *Delavan Engineering Co.*, 243 Iowa 39, 48, 50 N.W.2d 586, 591 (1951); *Fullerton* v. *Central Lincoln People's Utility District*, 185 Or. 28, 32,

201 P.2d 524, 526 (1948); *Equitable Trust Co.* v. *Prentice*, 250 N.Y. 1, 11, 164 N.E. 723, 725 (1928). Thus, while the term "income" sometimes refers to receipts which produce "gain or profit," that is not always the case.[1] See *Watkins* v. *Blinzinger*, 789 F.2d 474, 476-478 (7th Cir. 1986). And, as we noted in our opening brief (at 17), this Court's decision in *Heckler* v. *Turner*, 470 U.S. 184 (1985), makes clear that the AFDC program's use of the term "income" is not limited to receipts producing "gain or profit." Accordingly, the Secretary's determination that personal injury and workers' compensation awards can and should be treated as

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[1]Indeed, the very sources that respondents cite (Br. 13-15) confirm this point. Leading dictionaries in fact state that a *more* preferred use of the term "income" refers to all receipts, not just those producing "gain or profit" to the recipient. See *Webster's Third New International Dictionary* 1143 (1976 ed.) (defining "income" as "something that comes in as an increment or addition[,] usu[ally] by chance"); *Black's Law Dictionary* 687 (5th ed. 1979) (defining "income" as "[t]he return in money from one's business, labor, or capital invested," including but not limited to "gains, profits, salary, wages, etc."); see also 42 C.J.S. *Income* 528, 529 (1944) (footnote omitted) ("Generally or ordinarily the term ["income"] means all that comes in * * *."). Likewise, as shown in our opening brief (at 17-18 & n.4), the term "income" is used in the Internal Revenue Code, the Food Stamp Program, and the federal poverty guidelines in an all-inclusive sense. See 26 U.S.C. (& Supp. II) 61(a) ("gross income" in the Internal Revenue Code means "all income from whatever source derived"); 7 U.S.C. 2014(d) ("Household income for purposes of the food stamp program shall include all income from whatever source [derived]"); 48 Fed. Reg. 7010 (1983) (Income "[r]efers to total cash receipts before taxes from all sources."). Amounts received as personal injury awards are excluded from "income" in these programs only by express provision. See 26 U.S.C. 104(a) (Internal Revenue Code exclusion); 7 U.S.C. 2014(d)(8) (Food Stamp Program exclusion); 48 Fed. Reg. 7011 (1983) (poverty guidelines exclusion). Such exclusions would be unnecessary if the "plain and ordinary" meaning of the term "income" was limited, as respondents suggest, to receipts producing "gain or profit."

"income" is not rendered unreasonable by the fact that such awards may not produce "gain or profit."[2]

2. Respondents next contend (Br. 20-22) that the legislative history of the 1981 amendment to the Act shows that Congress intended to exclude personal injury and workers' compensation awards from the definition of "income" in this statute. This contention also has no merit.

As discussed in our opening brief (at 11-12, 14-16), the legislative history of the 1981 amendment reveals that, in 1981, Congress was troubled that the then "present treatment of [lump-sum] payments ha[d] the perverse effect of encouraging the [AFDC] family to spend such income as quickly as possible in order to retain AFDC eligibility." S. Rep. 97-139, 97th Cong., 1st Sess. 505 (1981) (Budget Committee Report). Congress responded to this problem by adopting the Secretary's proposal that states be required to prorate over future periods any lump-sum income received by an AFDC family—at least to the extent that the sum of the lump-sum payment and any other income available to the family exceeded the state-defined standard of need. See Staff of House Committee on Ways and Means, 97th Cong., 1st Sess., *Description of the Administration's Legislative Recommendations Under the Jurisdiction of the Ways and Means Comm.* 53 (Comm. Print 1981); Staff

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[2]In any event, respondents err in suggesting (Br. 15-19) that, because such awards are compensatory in purpose, personal injury and workers' compensation awards cannot produce "gain or profit." "Much of the value of [a personal injury or workers' compensation] award may represent lost wages, past and future." *Watkins* v. *Blinzinger*, 789 F.2d 474, 476 (7th Cir. 1986). Similarly, much of the remainder of any such award—attributable to pain and suffering, property damage, and/or bodily mutilation—may "reflect loss in future market opportunities" (*id.* at 476-477). To this extent, "the award for the loss therefore is a substitute for * * * [reduced potential] earnings" (*id.* at 477), and thus constitutes "income" in even the narrow sense in which respondents seek to confine the term.

of Senate Committee on Finance, 97th Cong., 1st Sess., *Proposals for Reductions in Spending Programs Under the Jurisdiction of the Senate Finance Committee* 33 (Comm. Print 1981). The legislative history makes no mention of any exclusion for personal injury or workers' compensation awards.

To be sure, both the 1981 amendment and its legislative history indicate that Congress intended the new proration requirement to apply only to a family's excess "income." See 42 U.S.C. (Supp. II) 602(a)(17); House Comm. on Ways and Means, 97th Cong., 1st Sess., *Tax Aspects of the President's Economic Program* 265 (Comm. Print 1981); S. Rep. 97-139, *supra*, at 505. Thus, Congress may not have intended for the proration requirement to apply to all large payments of money. Cf. Resp. Br. 20-21. But Congress did not define which large payments of money would constitute "income" for this purpose. Rather, as the Seventh Circuit has recently concluded, "[t]he most that can be said is that Congress did not prescribe any restriction on the definition" of lump-sum income (*Watkins* v. *Blinzinger*, 789 F.2d at 480) and that Congress instead "committed to the Secretary and the states" the task of defining which large payments would be included within that term (*id.* at 483). Accord *Barnes* v. *Cohen*, 749 F.2d 1009, 1017 (3d Cir. 1984).

Therefore, respondents plainly err in suggesting (Br. 20-21) that Congress intended for the proration requirement to apply only to payments reflecting accumulated gain. The Senate Finance Committee Report from which respondents quote clearly uses retroactive social security payments only as an *example* of a lump-sum payment that would be subject to proration. See S. Rep. 97-139, *supra*, at 436. Moreover, when the Senate Finance Committee Report states that, "[u]nder present law, any payments that meet the definition of income * * * are counted as income" (*ibid.*), it does so against a background in which some states

had been defining "income" to include gifts, inheritances, lottery winnings, damage claim settlements, and other insurance benefits. See J.A. 47, 58-59, 62-63, 66-67. These lump-sum payments plainly do not reflect accumulated gain. As noted in our opening brief (at 15), "[t]here is no reason to suppose that the Congress that enacted [the proration requirement] legislated in ignorance of" how states were treating these lump-sum payments—to wit, as "income." *Heckler* v. *Turner*, 470 U.S. at 197.

3. Respondents attempt to avoid this inevitable interpretation of congressional intent by suggesting (Resp. Br. 22-27) that the Secretary's pre-1981 amendment "definition" of "income" did not include personal injury or workers' compensation awards. But this suggestion is clearly incorrect.[3] As noted above, while the Secretary *required* states to treat lump-sum payments representing accumulated gain as "income" prior to 1981, he clearly also *permitted* states, in the spirit of "cooperative federalism" (*King* v. *Smith*, 392

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[3]Respondents' suggestion (Br. 26-27) that treating personal injury and workers' compensation awards as "income" will undermine the cost-savings goals of the 1981 amendment is equally mistaken. Personal injury and workers' compensation awards are subject to proration only to the extent they are not precommitted to other uses—such as attorney fees, back medical bills, Medicaid reimbursements, funeral expenses, and burial costs. See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)). Therefore, receipt of a personal injury or workers' compensation award will disqualify a family from receiving AFDC benefits only if, and to the extent, the amount remaining after these expenses are paid exceeds the state's standard of need. On that basis, the Secretary has quite reasonably determined that AFDC families will continue to have sufficient incentives to bring personal injury and workers' compensation suits and that, on balance, prorating the excess of any awards they receive therein will reduce the cost of the AFDC program. 51 Fed. Reg. 9196-9197 (1986) (estimating that requiring states to treat all lump-sums, including personal injury and workers' compensation awards, as "income" subject to proration will save the federal government $1 million annually). Respondents' contrary suggestion is unfounded.

U.S. 309, 316 (1968)), to treat personal injury or workers' compensation awards as "income." See J.A. 46-47, 58-59, 62-63, 66-67, 82-85. This is the administrative "definition" of "income" that Congress must have been aware of and approved when it enacted the proration requirement in 1981. See *Heckler* v. *Turner*, 470 U.S. at 197; *Young* v. *Community Nutrition Institute*, slip op. 9; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

4. Respondents also err in arguing (Br. 27-38) that the Secretary's position concerning the appropriate treatment of personal injury and workers' compensation awards in state AFDC benefit eligibility determinations has been inconsistent and, accordingly, is entitled to no deference.

Respondents' argument (Br. 28-29, 34) is based on a false premise: that the Secretary first allowed states the option to treat personal injury and workers' compensation awards as "income" after Congress enacted the 1981 amendment. As noted above and in our opening brief (at 15 & n.3), the Secretary actually has permitted states the option to treat personal injury and workers' compensation awards as "income" since at least 1957. See *Watkins* v. *Blinzinger*, 789 F.2d at 481 & n.7; see also J.A. 46-47, 58-59, 62-63, 66-67, 82-85. This long-standing practice led the Secretary to approve petitioner's treatment of respondents' personal injury and workers' compensation awards as "income" in this case; it is entitled to deference and is itself sufficient reason for reversal of the judgment below. See *Young* v. *Community Nutrition Institute*, slip op. 9; *CTFC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11; *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981).

In any event, respondents err in suggesting (Br. 29-38) that the Secretary's 1986 regulation is not entitled to this Court's deference. As noted in our opening brief (at 16),

prior to 1981, it made little difference whether certain nonrecurring lump-sum payments—which the Secretary traditionally termed "windfalls"—were treated as "income" or as "resources"; if not dissipated in the month of receipt, all such "windfalls" became "resources" in the following month and potentially disqualified a family from receiving AFDC benefits. Thus, recognizing that states have "legitimate local policies in determining eligibility" (*Batterton* v. *Francis*, 432 U.S. 416, 431-432 (1977)), the Secretary allowed states the option to treat lump-sum "windfalls" as either "income" or "resources." The 1981 amendment, however, made the distinction between "income" and "resources" one with important consequences; if treated as "income," the "windfall" could disqualify a recipient family from receiving AFDC benefits for several months. The states responded to this new rule differently and, after a spate of litigation resulted, the Secretary determined that for the first time the Act's orderly administration required a uniform definition of the term "income." See 49 Fed. Reg. 45558, 45561 (1984). Thus, contrary to respondents' argument (Br. 29-31), it was the Act's 1981 amendment (and the administrative problems associated with it) which provided the impetus and need for the Secretary's 1986 regulatory action.

Respondents' contention (Br. 9 n.2, 31-32 & n.10, 37 n.11) that, because he is involved in litigation on the issue, the Secretary cannot resolve by regulation whether the term "income" encompasses personal injury awards is simply wrong. "Congress authorized the issuance of regulations so that problems arising in the administration of the statute could be addressed. Litigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent. Thus, * * * [w]hen [the agency] responded to this problem by issuing regulations[,] it was doing no more than the task which Congress had assigned it." *United States* v. *Morton*, 467 U.S. 822, 835-836 n.21 (1984).

Respondents' argument (Br. 31-33) that the 1986 regulation departs from prior policy statements of the Secretary is also mistaken. The 1986 regulation simply does not, as respondents mistakenly assert, require states to treat lump-sum payments received from the sale of real or personal property as "income." To the contrary, the 1986 regulation requires states to treat only lump-sum "windfalls" (and accumulated gains) as "income." See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)); see also 51 Fed. Reg. 9196-9197 (1986). The Secretary has never characterized proceeds from the sale of property as lump-sum "windfalls." See 47 Fed. Reg. 5648, 5657 (1982). By contrast, the Secretary has traditionally characterized casualty loss and personal injury/workers' compensation awards as lump-sum "windfalls." See J.A. 62-63, 66-67. The final regulation thus requires states to treat personal injury/workers' compensation and casualty loss awards (but not proceeds from the sale of property) as "income"—at least to the extent such awards are not precommitted to other uses. See 51 Fed. Reg. 9205 (1986). In short, the Secretary's treatment of personal injury/workers' compensation awards, casualty loss awards, and proceeds from sale of property has been completely consistent over the years.[4]

Finally, there is no merit to respondents' claim (Br. 31, 34-38) that the Secretary promulgated this regulation in violation of the Administrative Procedure Act's "notice and

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[4]Personal injury and casualty loss awards, like lottery winnings and inheritances, and unlike the proceeds from property sales, reflect an element of chance—fortunate or unfortunate. The 1986 regulation reflects the Secretary's new determination that AFDC families reasonably can (and should) be expected to budget awards associated with chance; these families have funds available to them that otherwise similarly situated families—*i.e.*, families who have suffered the same loss or made a similar payment (for an insurance policy or lottery ticket), but who have received no payoff of chance—do not have. The Secretary's determination is a rational one and is entitled to the deference of this Court. See *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

comment" requirements. When the Secretary published the proposed regulation in the Federal Register, he indicated that the regulation would require states to treat all lump-sum "windfalls" as "income" for purposes of the proration rule. See 49 Fed. Reg. 45561 (1984). The Secretary has characterized personal injury and workers' compensation awards as "windfall" payments since at least 1957. See J.A. 58; see generally J.A. 46-48, 62-63, 67-68. Accordingly, several commentators specifically questioned whether the Secretary intended to require proration of personal injury or workers' compensation awards and, if so, whether such proration was fair or necessary. See 51 Fed. Reg. 9197 (1986). The Secretary responded to these comments both by stating that proration of personal injury awards "is consistent with Congressional intent that nonrecurring lump-sum payments be used to meet current as well as future needs" and by amending the regulation's wording to "clarify the policy and avoid future misunderstanding as to the[] [appropriate] treatment" of such awards (*ibid.*). While respondents may not agree with the Secretary's decision, they plainly err in suggesting that the final regulation was not "a 'logical outgrowth' of the original proposal and the notice and comments upon it." *Kennecott* v. *EPA*, 780 F.2d 445, 452-453 (4th Cir. 1985), cert. denied, No. 85-1741 (Oct. 6, 1986) (quoting *American Paper Institute* v. *EPA*, 660 F.2d 954, 959 n.13 (4th Cir. 1981)). See also *Chocolate Mfrs. Ass'n of* v. *Block*, 755 F.2d 1098, 1103-1105 (4th Cir. 1985); *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 643-644 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980). Indeed, the fact that respondents have been litigating since 1983 the question whether the Secretary may allow states to treat personal injury awards as "windfall" income subject to proration makes all the more untenable their claim that the Secretary's 1984 notice of rulemaking was inadequate. See J.A. 9, 21.

5. All that remains, therefore, is to consider respondents' claim (Br. 38-43) that, even if petitioner may treat personal injury and workers' compensation awards as "income" without violating the Act, petitioner has violated the Secretary's "equitable treatment" regulation by subjecting those awards, but not casualty loss payments, to the proration requirement. See 45 C.F.R. 233.10(a)(1). As noted in our opening brief (at 18-19), the promulgation of the Secretary's 1986 regulation renders this claim prospectively moot.[5] Moreover, the claim is without merit. It was clearly Congress's intent both that the states have substantial discretion in defining eligibility requirements in the AFDC program and that the Secretary and courts generally defer to any rational judgment the states make. See *Batterton* v. *Francis*, 432 U.S. at 430-432; *King* v. *Smith*, 392 U.S. at 318; *Dandridge* v. *Williams*, 397 U.S. 471, 478-479 (1970); *Watkins* v. *Blinzinger*, 789 F.2d at 478. Here, petitioner rationally and reasonably determined (Br. 19-20) that AFDC families in its jurisdiction could fairly be expected to budget personal injury and workers' compensation, but not casualty loss, awards. Accordingly, the Secretary has refused throughout this litigation to find that petitioner violated the

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[5]Respondents' arguments concerning why the "equitable treatment" claim is not moot (Br. 39-40) are contradictory. The argument that individuals suffering personal injuries will continue to be treated inequitably because they are less able than individuals suffering casualty losses to repair or replace their lost assets does not show that similarly situated individuals are being treated differently; to the contrary, it urges that the two categories of persons are not similarly situated and thus inadvertently concedes that petitioner has had a reasonable basis for concluding that individuals suffering personal injuries are not similarly situated to persons suffering casualty losses. See *Watkins* v. *Blinzinger*, 789 F.2d at 481-482 ("equitable treatment" regulation requires only that state treat "like things alike"). Thus, on respondents' own terms, they are not entitled to prevail with respect to their "equitable treatment" claim relating to the period of the prospective injunction ordered but stayed during October 1984 to March 1986.

"equitable treatment" regulation. The Secretary's interpretation of his own regulation is entitled to substantial deference from this Court. See *Blum* v. *Bacon*, 457 U.S. 132, 141-142, 145-146 (1982); see generally *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986), slip op. 12-13. Therefore, respondents' claim of "inequitable treatment" should be rejected.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

DECEMBER 1986